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6 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

7 MARIA DEL RIO LOW,

8 Plaintiff,

Case No. C17-0394 JCC

9 v.

10 NANCY A. BERRYHILL, Deputy
11 Commissioner of Social Security for Operations,

12 Defendant.

**ORDER REVERSING DENIAL OF
REQUEST TO WITHDRAW
RETIREMENT INSURANCE
BENEFITS APPLICATION**

13 Plaintiff, Maria del Rio Low, seeks review of the Commissioner's decision denying her
14 request to withdraw an application for retirement insurance benefits. Plaintiff contends that the
15 Social Security Administration ("SSA") issued an unconstitutional rule change, which the ALJ
16 applied to bar Plaintiff's withdrawal request, that the ALJ erred by finding that Plaintiff was not
17 misinformed when she filed for benefits, and that she should have been allowed to withdraw her
18 application regardless of the rule change because she was misinformed by the SSA. Dkt. 13. As
19 discussed below, the Court **REVERSES** the Commissioner's final decision and **REMANDS** the
20 matter to permit Plaintiff to withdraw her application for retirement insurance benefits.

21 **I. BACKGROUND**

22 Plaintiff is currently 71 years old. *See* Tr. 17. On September 25, 2009, at the age of 62,
23 Plaintiff submitted an application for retirement insurance benefits to the SSA. Tr. 17-20.

1 Plaintiff reported that this application was submitted over the phone after speaking with an SSA
2 employee. *See* Tr. 56. In the application, Plaintiff reported that she was previously married for
3 approximately 15 years, and that the marriage ended by divorce in 1986. Tr. 17. The application
4 included several other boilerplate statements. First, it stated that Plaintiff was applying “for all
5 insurance benefits for which I am eligible under Title II (federal old-age, survivors, and disability
6 insurance) . . . of the Social Security Act” *Id.* Second, it stated that Plaintiff “want[ed]
7 benefits beginning with the earliest possible month based on my earnings.” Tr. 18.

8 On October 2, 2009, the SSA issued Plaintiff a notice of award informing her that she
9 was entitled to retirement benefits beginning in September 2009, and that the first payment
10 would issue on October 8, 2009. Tr. 21.

11 On May 31, 2012, Plaintiff filed a request for withdrawal of her application for retirement
12 benefits. Tr. 35. Plaintiff later explained that she wanted to withdraw her application so she
13 could apply for divorced spouse benefits starting at age 66, her full retirement age, and then
14 switch to receiving benefits on her own account at age 70. Tr. 134-35. By taking this route,
15 Plaintiff would avoid the 25 percent reduction in monthly benefits that occurred due to her
16 receiving early retirement benefits starting at age 62. Tr. 135. She would also receive an eight
17 percent per year increase in the monthly benefits she would receive on her own account by
18 taking the divorced spouse benefit at age 66 and delaying receipt of retirement benefits on her
19 own account until age 70. Tr. 135.

20 On September 21, 2012, the SSA notified Plaintiff that it could not approve her
21 withdrawal request because it was received more than 12 months after she was eligible for and
22 began receiving benefits. Tr. 40-42. The SSA denied Plaintiff’s request for reconsideration on
23 December 6, 2013. Tr. 48-51.

1 On August 28, 2014, an administrative law judge (“ALJ”) held a hearing to consider
2 Plaintiff’s withdrawal request. Tr. 145. Plaintiff argued that she should be allowed to withdraw
3 her application because at the time she filed the application, SSA regulations allowed a claimant
4 to withdraw their applications at any time. Tr. 79-81. On December 8, 2010, over a year after
5 Plaintiff began receiving benefits, the SSA had enacted a new regulation imposing a 12-month
6 time limit on withdrawal of benefits applications. *See* 20 C.F.R. § 404.640(b)(4). Plaintiff
7 argued that this was an unlawfully retroactive regulation. Tr. 79-81.

8 Plaintiff also argued that she should be allowed to withdraw her application because she
9 had been misinformed by the SSA when she filed her application. Tr. 153. Despite reporting
10 that she was divorced, Plaintiff alleged that the SSA employee she spoke to on the phone during
11 the application process never told her she was eligible for divorced spouse benefits. *Id.* As
12 explained above, Plaintiff argued that if she had known she was eligible for divorced spouse
13 benefits, she would not have filed for retirement benefits starting at age 62, and instead would
14 have waited until age 66 to file for divorced spouse benefits. *See* Tr. 155. Once she reached age
15 70, she would then file for retirement benefits based on her own earnings history. *See* Tr. 155-
16 56. Plaintiff admitted, however, that her claim that she was misinformed was based entirely on
17 her own statements, and that she had no documentary evidence on the issue. Tr. 151.

18 **II. THE ALJ’S DECISION**

19 On December 22, 2014, the ALJ issued a decision denying Plaintiff’s request to withdraw
20 her retirement benefits application. Tr. 12. The ALJ determined that he had no authority to
21 decide whether the SSA’s rule imposing a 12-month time limit on withdrawal of an application
22 was permissible. Tr. 14. Accordingly, he applied that 12-month time limit to find that Plaintiff
23 was precluded from withdrawing her application. Tr. 15.

1 The ALJ nonetheless analyzed Plaintiff's argument that she should be allowed to
2 withdraw her application because she had been misinformed by the SSA at the time she filed it.
3 *See* Tr. 13-16. The ALJ first determined that Plaintiff would not have been eligible to receive
4 dual benefits—meaning her retirement benefits on her own account and divorced spouse
5 benefits—at the time she filed her application. Tr. 14. The ALJ then determined that Plaintiff
6 could not have been misinformed by the SSA at the time of her application because she was not
7 eligible for divorced spouse benefits at that time, and thus there was no additional benefit about
8 which the SSA was obligated to inform her. Tr. 15.

9 The ALJ further held that, regardless of eligibility, Plaintiff had not proven that she was
10 misinformed. Tr. 16. Under 20 C.F.R. § 404.633(d)(2), the SSA “will not find that [it] gave [a
11 claimant] misinformation . . . based solely on [the claimant's] statements.” The ALJ stated that
12 the only evidence Plaintiff produced was her statements, and, therefore, she could not establish
13 that she was misinformed and entitled to relief. Tr. 16.

14 The Appeals Council denied Plaintiff's request for review, making the ALJ's decision the
15 Commissioner's final decision. Tr. 4. Plaintiff subsequently filed for review in this Court. Dkt.
16 5. After the parties completed their briefing, the Court requested and the parties submitted
17 supplemental briefing on Plaintiff's retroactivity claim and her entitlement to divorced spouse
18 benefits at full retirement age if she had not previously applied for benefits. Dkt. 23, 30, 31.

19 **III. DISCUSSION**

20 Individuals may receive retirement benefits if they are fully insured, have reached age 62,
21 and file an application for such benefits. 42 U.S.C. § 402(a). Individuals who begin receiving
22 benefits at age 62 receive reduced retirements benefits, sometimes referred to as “early
23 retirement” benefits. *See* 20 C.F.R. § 404.410. Individuals who wait until they reach full

1 retirement age—which ranges between ages 65-67 depending on birthdate—to begin collecting
2 benefits are entitled to unreduced benefits. *See* 20 C.F.R. § 404.409. Individuals in Plaintiff’s
3 age bracket can further increase their retirement benefits by delaying receipt of those benefits
4 until age 70. *See* 20 C.F.R. § 404.313.

5 Certain individuals may also be entitled to receive benefits as a divorced spouse,
6 provided (1) they were validly married to an insured person, (2) the marriage lasted for at least
7 10 years; (3) they have been divorced from the insured person for at least two years; (4) they are
8 not married; (5) they are age 62 or older; (6) they apply for divorced spouse benefits; and (7)
9 they are not entitled to retirement or disability benefits on their own account that are equal to or
10 larger than half of the insured former spouse’s primary retirement benefits. *See* 20 C.F.R. §§
11 404.331 & 404.333.

12 Individuals who file for retirement benefits prior to reaching full retirement age are
13 deemed to apply for all possible benefits. *See* Soc. Sec. Admin., Program Operations Manual
14 Sys. (“POMS”) GN 00204.020.¹ However, once an individual reaches full retirement age, she
15 can restrict her application to only one benefit. POMS GN 00204.020(D)(1)(b). An individual
16 who would otherwise be ineligible for divorced spouse benefits if she applied for her own
17 retirement benefits could therefore become eligible for divorced spouse benefits by waiting until
18 full retirement age to apply for benefits, and then restricting her application to only divorced
19 spouse benefits. The individual could then wait until age 70 to apply for retirement benefits on
20 her own account, at which point those benefits would have reached their maximum monthly
21 amount. *See* 20 C.F.R. § 404.313.

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23 ¹ This section of the POMS has been revised since Plaintiff filed her application for benefits. However,
those revisions do not impact the outcome of this case, and are therefore not further discussed.

1 Plaintiff filed her application for retirement benefits at age 62. *See* Tr. 17-20. Because
2 she had not reached full retirement age, she could not restrict her application, and was therefore
3 deemed to have filed for all benefits. *See* POMS GN 00204.020; *see also* Tr. 17. As a result,
4 Plaintiff was not eligible for divorced spouse benefits because her benefits on her own account
5 exceeded half of her former spouse's primary retirement benefits. *See* Tr. 132.

6 Plaintiff contends (1) that the SSA violated her due process rights by revising its rules to
7 retroactively impose a 12-month time limit on withdrawal of an application for benefits; (2) that
8 the ALJ erred in finding that she was not misinformed at the time she submitted her application;
9 and (3) that the ALJ erred in denying her request to withdraw her application based on her
10 having been misinformed. *See* Dkt. 13 at 8-9. Because the Court finds that the SSA's 12-month
11 time limit as imposed in this case was impermissibly retroactive, the Court need not reach
12 Plaintiff's last two arguments.

13 As an initial matter, the SSA challenges the Court's authority to review Plaintiff's due
14 process challenge to 20 C.F.R. § 404.640, arguing that 42 U.S.C. § 405(g) restricts judicial
15 review only to the ALJ's final decision. Dkt. 20 at 6. The SSA is wrong. *See McNary v.*
16 *Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 492 (1991); *Nat'l Mining Ass'n v. Dep't of Labor*, 292
17 F.3d 849, 856 (D.C. Cir. 2002).

18 Plaintiff's primary argument is that the SSA promulgated an impermissibly retroactive
19 regulation when it imposed a 12-month time limit on withdrawal of applications for retirement
20 benefits, and that the SSA deprived her of due process in doing so. At the time Plaintiff applied
21 for and was awarded benefits, SSA regulations permitted her to withdraw her application at any
22 time. *See* 75 Fed. Reg. 76,256, 76,257 (Dec. 8, 2010). On December 8, 2010, over a year after
23 Plaintiff began receiving benefits, the SSA enacted a regulation stating that applications could

1 not be withdrawn if the request to withdraw was filed more than 12 months after the first month
2 a claimant began receiving benefits. *See id.*; 20 C.F.R. 404.640(b)(4)(i). Because Plaintiff
3 started receiving benefits in October 2009, this new regulation meant that she immediately lost
4 any ability to withdraw her application.

5 Analysis of an allegedly retroactive regulation requires several steps, all of which derive
6 from the principle that retroactivity is not favored in the law. *See Bowen v. Georgetown Univ.*
7 *Hosp.*, 488 U.S. 204, 208 (1988). First, the court looks to whether Congress has given the
8 agency promulgating the regulation authority to make retroactive rules. *Id.* An agency's
9 authority to promulgate regulations is strictly limited to the power it is given by Congress. *Id.*
10 Thus, unless the agency has been given authority by Congress to make retroactive regulations, it
11 cannot do so. *Id.*

12 This first step is easily resolved. Congress generally has not granted the SSA retroactive
13 rulemaking authority. *See Frost v. Barnhart*, 314 F.3d 359, 371 (9th Cir. 2002); *Combs v.*
14 *Comm'r of Soc. Sec.*, 459 F.3d 640, 645 (6th Cir. 2006) (citing *Bowen*, 488 U.S. at 213 & n.3).
15 The SSA has pointed to no specific statutory language that would allow for retroactive
16 rulemaking here. *See* Dkt. 20 & 30. The Court accordingly concludes that the SSA did not have
17 authority to enact retroactive regulations in the current context.

18 Second, the Court looks at whether the language of the regulation at issue is such that it
19 must be considered retroactive. Administrative regulations will not be construed to have
20 retroactive effect unless the language of the regulations requires this result. *Bowen*, 488 U.S. at
21 208; *see Frost*, 314 F.3d at 371 (““Regulations cannot be applied retroactively unless Congress
22 has so authorized the administrative agency and the language of the regulations requires this
23 result.””) (quoting *Scamihorn v. Gen. Truck Drivers*, 282 F.3d 1078, 1083 (9th Cir. 2002)).

1 A regulation is retroactive when it “attaches new legal consequences to events completed
2 before its enactment.” *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994). A regulation is
3 not retroactive when it applies only to future events or clarifies legal principles that were already
4 in effect, and does not change substantive standards of entitlement. *See Regions Hosp. v.*
5 *Shalala*, 522 U.S. 448, 456 (1998) (holding that regulation was not impermissibly retroactive
6 because it called for the “correct” application of existing reimbursement principles, “not the
7 application of any new reimbursement principles”). In analyzing retroactivity, “familiar
8 considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance.”
9 *Landgraf*, 511 U.S. at 270.

10 The SSA’s 12-month time limit is impermissibly retroactive as applied to Plaintiff. It did
11 not merely clarify existing legal principles, but altered the consequences of Plaintiff’s prior
12 actions. When she began receiving retirement benefits, Plaintiff could withdraw her application
13 at any time. Plaintiff could decide to withdraw her application and repay the early retirement
14 benefits she had received, preserving her eligibility to later receive unreduced retirement
15 benefits, or to seek divorced spouse benefits. But once the SSA promulgated its 12-month
16 withdrawal time limit, Plaintiff immediately lost the ability to withdraw her application. *See* 20
17 C.F.R. 404.640(b)(4)(i). She had no notice and no opportunity to conform her actions based on
18 her settled expectations of the law. The SSA’s 12-month time limit was therefore impermissibly
19 retroactive as applied to Plaintiff.

20 **IV. CONCLUSION**

21 For the foregoing reasons, the Commissioner’s final decision is **REVERSED** and this
22 case is **REMANDED** to permit Plaintiff to withdraw her application for retirement insurance
23 benefits.

1 DATED this 13th day of August 2018.

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5 John C. Coughenour
6 UNITED STATES DISTRICT JUDGE
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